U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB Nos. 24-0230 BLA and 24-0231 BLA

DORIS BROWNING (o/b/o and Widow of RB BROWNING)_	)	
Claimant-Respondent	)	
v.	)	
ARCH OF KY / APOGEE COAL COMPANY	)	**NOT-PUBLISHED**
and	)	DATE ISSUED: 05/29/2025
ARCH RESOURCES, INCORPORATED	)	
Employer/Carrier-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Michael A. Pusateri (Greenberg Traurig LLP), Washington, D.C., for Employer and its Carrier.

Amanda Torres (Jonathan Snare, Deputy Solicitor of Labor; Jennifer Feldman Jones, Acting Associate Solicitor; William M. Bush, Acting Counsel for Administrative Appeals), Washington, D.C., for the Acting

Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: GRESH, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

GRESH, Chief Administrative Appeals Judge, and ROLFE, Administrative Appeals Judge:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Joseph E. Kane's Decision and Order Granting Benefits (2021-BLA-05510, 2021-BLA-05513) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim filed on May 22, 2019, and a survivor's claim filed on May 12, 2020.

The ALJ found Apogee Coal Co. (Apogee) is the responsible operator, and Arch Coal, Incorporated, now Arch Resources (Arch), is the responsible carrier liable for payment of benefits. Considering entitlement, the ALJ credited the Miner with over ten years of coal mine employment and found Claimant[1] established the Miner had complicated pneumoconiosis, thereby invoking the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. He further found the Miner's complicated pneumoconiosis arose out of his coal mine employment and awarded benefits in the miner's claim. 20 C.F.R. §718.203(b). Because he awarded benefits in the miner's claim, he further found Claimant automatically entitled to survivor's benefits under Section 422(*l*) of the Act.[2] 30 U.S.C. §932(*l*).

On appeal, Employer argues the ALJ lacked authority to hear and decide the case because he was not appointed in a manner consistent with the Appointments Clause of the

[1] Claimant is the widow of the Miner, who died on June 15, 2019. Survivor's Claim (SC) Director's Exhibit 14. She is pursuing the miner's claim on behalf of his estate alongside her own survivor's claim.

[2] Section 422(*l*) of the Act provides that the survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018).

Constitution, Art. II § 2, cl. 2.[3] It also argues the removal provisions applicable to ALJs rendered his appointment unconstitutional. Further, it contends the ALJ erred in finding Arch is the liable carrier. Claimant has not filed a response brief. The Acting Director, Office of Workers' Compensation Programs (the Director), responds, urging the Benefits Review Board (Board) to affirm the ALJ's determination that Arch is liable for benefits. Employer replied to the Director's brief, reiterating its contentions on appeal.[4]

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Appointments Clause and Removal Protections

Employer urges the Board[6] to vacate the ALJ's Decision and Order and remand the case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC*,

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[3] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

[4] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established entitlement to benefits in both the miner's and survivor's claims. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 6-7.

[5] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because the Miner performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Miner's Claim (MC) Director's Exhibit 4.

[6] We reject Employer's assertion that the Board lacks authority to decide constitutional issues. Employer's Brief at 14 (citing *Carr v. Saul*, 141 S. Ct. 1352 (2021)). Employer's reliance on *Carr* is misplaced. In *Carr*, the United States Supreme Court held that Social Security procedures did not require claimants for Social Security disability

585 U.S. 237, 138 S. Ct. 2044 (2018).[7] Employer's Brief at 14-20. It acknowledges the Secretary of Labor ratified the prior appointments of all sitting Department of Labor (DOL) ALJs on December 21, 2017,[8] but maintains the ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment. *Id*.

In addition, it challenges the constitutionality of the removal protections afforded DOL ALJs. *Id*. It generally argues the removal provisions for ALJs contained in the Administrative Procedures Act, 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia*. Employer's Brief at 17-20. Moreover, it relies on the United States Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), and *Seila Law v.*

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benefits to raise their Appointments Clause challenges to their respective Social Security Administration ALJs. 141 S. Ct. at 1356, 1360-62. Contrary to Employer's assertion, the Board has both the inherent authority and vested authority to consider constitutional questions arising in cases before it. *See McCluseky v. Zeigler Coal Co.*, 2 BLR 1-1248, 1-1258-62 (1981); *see also Gibas v. Saginaw Mining Co.*, 748 F.2d 1112 (6th Cir. 1984); *Carozza v. U.S. Steel Corp.*, 727 F.2d 74 (3d Cir. 1984). In addition, the United States Court of Appeals for the Sixth Circuit has held the Board may address timely-raised Appointment Clause challenges. *Island Creek Coal Co. v. Bryan*, 937 F.3d 738, 753 (6th Cir. 2019).

[7] *Lucia* involved a challenge to the appointment of a Securities and Exchange Commission (SEC) ALJ. The United States Supreme Court held that, similar to Special Trial Judges at the United States Tax Court, SEC ALJs are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. 237, 251 (2018) (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)). The Department of Labor (DOL) has conceded the Supreme Court's holding applies to its ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

[8] The Secretary of Labor (Secretary) issued a letter to the ALJ on December 21, 2017, stating:

> In my capacity as head of the [DOL], and after due consideration, I hereby ratify the Department's prior appointment of you as an [ALJ]. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, [ALJs] of the U.S. [DOL] violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

Secretary's Dec. 21, 2017 Letter to ALJ Kane.

CFPB, 591 U.S. 197, 140 S. Ct. 2183 (2020), as well as the opinion of the United States Court of Appeals for the Federal Circuit in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *vacated*, 594 U.S. 1 (2021). *Id.*

For the reasons set forth in *Johnson v. Apogee Coal Co.*, 25 BLR 1-351, 1-353-55 (2023), *aff'd*, *Apogee Coal Co., LLC v. Director, OWCP* [*Johnson*], 112 F.4th 343 (6th Cir. 2024), and *Howard v. Apogee Coal Co.*, 25 BLR 1-301, 1-307-08 (2022), *aff'd sub nom.*, *Apogee Coal Co. v. Director, OWCP* [*Howard*], 112 F.4th 343 (6th Cir. 2024), *cert. denied*, 605 U.S. , (May 27, 2025), we reject Employer's arguments.

Responsible Insurance Carrier

Employer does not challenge the ALJ's findings that Apogee is the correct responsible operator and was self-insured by Arch on the last day Apogee employed the Miner; thus, we affirm these findings.[9] *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §§725.494(e), 725.495, 726.203(a); Decision and Order at 9. Rather, it alleges Patriot Coal Corporation (Patriot) should have been named the responsible carrier and thus liability for the claim should transfer to the Black Lung Disability Trust Fund (Trust Fund). Employer's Brief at 25-36.

In 2005, after the Miner ceased his employment with Apogee, Arch sold Apogee to Magnum Coal (Magnum), and in 2008 Magnum was sold to Patriot. Director's Response Brief at 2. On March 4, 2011, the DOL authorized Patriot to insure itself and its subsidiaries, retroactive to 1973. Miner's Claim (MC) Director's Exhibit 40 at 456. Although Patriot's self-insurance authorization made it retroactively liable for the claims of miners who worked for Apogee, Patriot later went bankrupt and can no longer provide for those benefits. Director's Brief at 2. Nothing, however, relieved Arch of liability for paying benefits to miners last employed by Apogee when Arch owned and provided self-insurance to that company. Decision and Order at 8-9.

Employer raises several arguments to support its contention that Arch was improperly designated the responsible carrier in this claim and thus the Trust Fund, not

[9] Employer argues there is no insurance policy or self-insurance agreement establishing Arch's liability. Employer's Brief at 25-28. However, the Notice of Claim specifically identifies Arch as Apogee's insurance carrier, Miner's Claim (MC) Director's Exhibit 20, and Employer's other arguments tend to acknowledge Arch was the self-insurer of Apogee at the time of the Miner's last date of employment. *See*, *e.g.*, Employer's Brief at 8, 30-31, 34-37 (framing the decision to name Arch liable instead of Patriot as involving a choice between Apogee's last insurer or its insurer on the date of the Miner's last exposure to coal mine dust).

Arch, is responsible for the payment of benefits following Patriot's bankruptcy: (1) the ALJ evaluated Arch's liability for the claim as a responsible operator or commercial insurance carrier rather than as a self-insurer; (2) the Director did not prove that Arch's self-insurance covered Apogee for this claim;[10] (3) without proof of coverage, the DOL improperly pierced Arch's corporate veil in holding it liable; and (4) the sale of Apogee to Magnum released Arch from liability for the claims of miners who worked for Apogee, and the DOL endorsed this shift of liability. Employer's Brief at 20-43; Employer's Reply to the Director's Brief at 2-7.

The Board has previously considered and rejected these and similar arguments under the same determinative facts related to the Patriot bankruptcy in *Bailey v. E. Assoc. Coal Co.*, 25 BLR 1-325, 1-332-39 (2022) (en banc); *Howard*, 25 BLR at 1-308-18; and *Graham v. E. Assoc. Coal Co.*, 25 BLR 1-289, 1-295-99 (2022). For the reasons set forth in *Bailey*, *Howard*, and *Graham*, we reject Employer's arguments.

Employer additionally contends the trigger for liability in self-insured claims is dictated by the dates of the surety bonds used to secure its self-insurance program. Employer's Brief at 30-34. It further contends the DOL retroactively changed the liability trigger date to the miner's last day of employment, as reflected in Black Lung Benefits Act (BLBA) Bulletin No. 16-01,[11] and this policy imposes new liability on self-insured mine operators that bypasses the rulemaking requirements of the Administrative Procedure Act

[10] Employer further argues Arch's self-insurance authorizations from 2006 and 2011—which did not include Magnum subsidiaries such as Apogee—affirmatively establish Arch's self-insurance does not cover Apogee for this claim. Employer's Brief at 27-28; Employer's Reply to the Director's Brief at 3-5. We disagree. Employer's self-insurance covered Apogee on the last day of the Miner's employment with Apogee. Director's Response Brief at 10; *see* Employer's Brief at 8. As the Director argues, subsequent self-insurance authorizations excluding Apogee are irrelevant, as they do not show Arch was released from claims originating when it maintained coverage for Apogee. Director's Response Brief at 10; *see Apogee Coal Co. v. Director, OWCP* [*Howard*], 112 F.4th 343, 354 (6th Cir. 2024) (Arch . . . claim[s] its sale of Apogee's liability completely severed the two businesses and insulated it from future Apogee-originated claims. . . . But this ignores the plain language of the regulations[.]"), *aff'd sub nom.*, *Apogee Coal Co. v. Director, OWCP* [*Howard*], 112 F.4th 343 (6th Cir. 2024), *cert. denied*, 605 U.S. , (May 27, 2025).

[11] BLBA Bulletin No. 16-01 is a memorandum to the Director of the Division of Coal Mine Workers' Compensation issued on November 12, 2015, to "provide guidance of district office staff in adjudicating claims" affected by Patriot's bankruptcy.

(APA) and violates Employer's due process rights. Employer's Brief at 37-43; Employer's Reply to the Director's Brief at 5. In addition, it contends the ALJ did not adequately address its liability evidence or its challenges to BLBA Bulletin No. 16-01. Employer's Brief at 20 (citing *Arch Coal, Inc. v. Acosta*, 888 F.3d 493 (D.C. Cir. 2018)), 20-25, 37-43; Employer's Reply to the Director's Brief at 2-3, 5. We disagree.

Arch Coal contends its surety bonds used as security for its self-insurance authorization create a trigger for liability that only applies while the bond is in force. Employer's Brief at 26. However, as we explained in *Bailey*, liability is created by the Act and the regulations, and not by the DOL's authorization to self-insure or by the security itself. *See Bailey v. E. Assoc. Coal Co.*, 25 BLR 1-325, 1-335 (2022) (en banc); *see also United States v. Insurance Co., of North America*, 83 F.3d 1507, 1513 (D.C. Cir. 1996) (holding the principal is liable for claims arising during the period that a bond is in effect). For the same reasons, Employer's argument that the DOL changed its policy must fail, as it is the Act and regulations that dictate liability. *Id.*

As the Director argues, the ALJ correctly determined Arch's liability is established under the Act and regulations, not BLBA Bulletin No. 16-01, and therefore BLBA Bulletin No. 16-01 is "irrelevant[.]"[12] Director's Brief at 8, 12; Decision and Order at 7-9; *see Howard*, 112 F.4th at 356 (Bulletin No. 16-01 "did not create new rights nor liabilities" and thus "did not require notice and comment rulemaking."), *affirming Howard*, 25 BLR at 1-308-18 (rejecting similar challenges to BLBA Bulletin No. 16-01). We therefore find the ALJ's failure to address Employer's evidence concerning Bulletin No. 16-01 is,

[12] Employer argues the decision of the United States Court of Appeals for the Seventh Circuit in *Apogee Coal Co. v. Director, OWCP* [*Grimes*], 113 F.4th 751 (7th Cir. 2024), mandates remand on the ground that the ALJ in this case "failed to identify a source of positive law . . . obliging Arch to insure a former subsidiary." Employer's Reply to Director's Brief at 1-2. We disagree. In *Grimes*, the Seventh Circuit determined the Board's decision in *Howard* was not sufficient to establish Arch's liability as a responsible carrier for a claim accrued against Apogee when it was an Arch subsidiary. The court reasoned that *Howard* did not identify a "concrete basis in positive law or principle of equity" that established parent corporation liability in such a context. 113 F.4th at 760. In so doing, the Seventh Circuit recognized its decision was at odds with the decision of the United States Court of Appeals for the Sixth Circuit affirming the Board's decision in *Howard* as establishing Arch's liability under similar circumstances. *Id.* at 761 (citing *Howard*, 112 F.4th 343). As the United States Supreme Court denied a Petition for a Writ of Certiorari in *Howard*, the Sixth Circuit's decision in *Howard* is still binding precedent upon the Board. Employer's reliance on *Grimes* is inapposite. We therefore reject Employer's argument.

contrary to our dissenting colleague's assertion, harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Thus, we affirm the ALJ's determination that Apogee and Arch are the responsible operator and carrier, respectively, and are liable for this claim.

Accordingly, we affirm the ALJ's Decision and Order Granting Benefits.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring and dissenting:

I agree with the majority's affirmance of the administrative law judge's (ALJ's) award of benefits and its response to Employer's arguments pertaining to appointment and removal of ALJs. However, I agree with Employer that the ALJ erred in relying on *Howard v. Apogee Coal Co.*, 25 BLR 1-301, 1-308-18 (2022), *aff'd sub nom.*, *Apogee Coal Co. v. Director, OWCP* [*Howard*], 112 F.4th 343 (6th Cir. 2024), *cert. denied*, 605 U.S. , (May 27, 2025), to reject Employer's arguments without addressing the liability evidence of record here. *Howard* was issued in the absence of any evidence supporting Employer's liability-related arguments, because Employer failed to timely submit liability-related evidence before the district director. Since Employer submitted liability-related evidence

that is properly of record here, and it is possible that evidence could affect the outcome,[13] I would remand the case to the ALJ to consider the evidence Employer introduced.

I otherwise concur with the majority in all other respects.

JUDITH S. BOGGS
Administrative Appeals Judge

[13] In *Howard*, the Board adopted the Director's proffered interpretation of the relevant regulations. It is possible that evidence as to prior practice and interpretation of the regulations by the Department could lead the Board to reach a different conclusion.